circumstances, then probably the danger that I have been afraid of will not exist.

The plaintiff has obtained judgment, and it seems to me impossible to suggest that on the basis of the orders which I have made, the plaintiff ought to be deprived of its rights on the judgment the fruits of which it would have been fully entitled. Therefore, whether the judgment and the orders which I have made are right or wrong – and that is a matter which may be tested in the Supreme Court – I reach the conclusion that there is nothing in the law and the facts which I have already mentioned which would make it just or proper for me to grant a stay of execution.

The application for a stay of execution was therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Saheran & Woon*; *Asbir, Hira Singh & Co.*

Reported by *Wong Kim Fatt*

Karpal Singh & Ors v Penguasa Tempat Tahanan Perlindungan Taiping and another application

HIGH COURT (IPOH) – ORIGINATING MOTION NOS 32-86-88 AND 32-88-88
ABDUL MALEK J
29 APRIL 1989

Administrative Law – Order of certiorari – Whether the respondent is amenable to certiorari – Absence of due enquiry as provided for under Rules – Punishment meted out even before enquiry had been held – Whether notice or adequate notice had been given – Whether charge was sufficiently particularized – Internal Security (Detained Persons) Rules 1960, rr 71 & 73(h)

The applicants sought an order for certiorari to quash the decision of the respondent dated 1 November 1988 whereby all the applicants were purportedly found guilty of a charge under r 73(h) of the Internal Security (Detained Persons) Rules 1960 for refusing without reasonable excuse to eat the food provided in the place of detention and sentenced to punishment of seven days of deprivation of privilege of seeing their respective families and legal advisers backdated to 8am on 27 October 1988 and costs. The following issues were raised at the hearing:

(1) whether the respondent is amenable to certiorari;
(2) the absence of due enquiry in the matter as provided for under the relevant punishment rule;
(3) the fact that the punishment of the applicants had been imposed before the enquiry;
(4) the fact that no notice or no adequate notice was given notwithstanding the punitive nature of the matter;
(5) the fact that the charges had not been particularized.

Held, allowing the applications:

(1) The court has jurisdiction to entertain an application for judicial review of a prison superintendent's disciplinary award as an essential characteristic of the rights of a subject is a right of recourse to the courts whatever his status and however attenuated his rights and liabilities might be in consequence of some punitive or other process.

(2) In the present case, the applicants in the first originating motion had not been allowed to make their representations as their protestations had been ignored, and in the case of the applicants in the second originating motion they were in fact not even present. In consequence, the question of mitigation of sentence could not even arise.

(3) The imposition of punishment on the applicants before the enquiry was in effect a contravention of the relevant rule under which the respondent had acted as the relevant provision clearly states that the punishment should be meted out only 'after due enquiry'.

(4) In the first originating motion, the applicants were only informed of the enquiry 27 minutes before the commencement of the enquiry whilst the applicants in the second originating motion were told of the enquiry only after it had begun. In consequence, they were not present at the enquiry. The resultant effect was that the applicants in the first originating motion had insufficient notice and the applicants in the second originating motion had no notice at all.

(5) The charges had not been particularized. In fact, there was no specific charge as stated in the letter except for the heading as regards the hunger strike. There were also no notes of the relevant proceedings to assist the court as to what actually happened at the 'enquiry'.

(6) There was no necessity for the respondent to totally ignore the legislative provisions in the process of taking precautions. There was also no clear evidence why the precautions were necessary in the first place.

(7) In view of the sequence of events and the affidavits and arguments of both parties, the respondent had acted arbitrarily in the circumstances and had failed to observe the rules of natural justice in the process. To allow the punishment to stand would amount to blatant disregard of the provisions designed by legislative process to protect those very persons who had been punished because those provisions had been ignored.

Case referred to

1 *Leech* v *Deputy Governor of Parkhurst Prison* (1988) 1 AC 533 (folld)

Legislation referred to

Internal Security (Detained Persons) Rules 1960 rr 71, 73(h)

Karpal Singh in person and for the other applicants.
Noraini Zulkiflee for the respondent.

Cur Adv Vult

Abdul Malek J: The three applicants in originating motion 32-86-88 (hereinafter 'the first OM') and the four applicants in Originating Motion 32-88-88 (hereinafter 'the second OM') are applying for an order of certiorari to quash the decision of the respondent dated 1 November 1988 whereby all the applicants were purportedly found guilty of a charge under r 73(h) of the Internal Security (Detained Persons) Rules 1960 (hereinafter 'the Rules'), for refusing without reasonable excuse to eat the food provided in the place of detention, and sentenced to

punishment of seven days of deprivation of privilege of seeing their respective families and legal advisers backdated to 8am on 27 October 1988 and costs. Leave for these applications had in fact been granted by this court on 26 January 1989.

The first issue is whether the respondent is amenable to certiorari and on this point the court would follow, as this is believed to be the first time such an application has been made in this country against a prison superintendent, the 1988 decision of the House of Lords in *Leech* v *Deputy Governor of Parkhurst Prison*[1] where it was held that the court had jurisdiction to entertain an application for judicial review of a prison governor's disciplinary award as an essential characteristic of the rights of a subject was a right of recourse to the courts whatever his status and however attenuated his rights and liabilities might be in consequence of some punitive or other process.

The second issue is the absence of due enquiry in the matter as provided for under the relevant punishment rule as the respondent had acted under r 71(b) of the Rules. For ease of reference, r 71 of the Rules states:

> A Superintendent may punish any detained person found after due enquiry to be guilty of a minor offence as hereinafter specified by ordering him to undergo one or more of the following punishments –
> (a) confinement in a punishment cell for a term not exceeding five days on punishment diet;
> (b) deprivation for such period as the Superintendent may think fit of any privilege, whether relating to food, books, clothing, luxuries of any description, letters, visitors, or any other matter whatever, of which he may be in enjoyment; or
> (c) reprimand.

In the case of the three applicants in the first OM they had not been allowed to make their representations, as their protestations had been ignored, and in the case of the four applicants in the second OM they were in fact not even present. In consequence, the question of mitigation of sentence could not even arise.

The third issue is that the punishment on the seven applicants had been imposed before the enquiry – this in effect was in contravention of the relevant rule under which the respondent had acted as the relevant provision clearly states that the punishment should be meted out only 'after due enquiry'. This also raises the point that if the respondent had found the seven applicants not guilty at the purported enquiry, the punishment had in fact been carried out for the six days prior to the decision. Notice had been given to the respondent on 26 October 1988 as regards the hunger strike but the respondent, instead of making objections or holding any enquiry, imposed the punishment immediately from 27 October 1988 at 8am. The respondent only decided to hold the enquiry six days after imposing the punishment.

The fourth issue is that no notice or no adequate notice was given and in view of the punitive nature of the matter, the notice was therefore invalid. The applicants in the first OM had been informed by the respondent's letter dated 1 November 1988 at 5pm as regards the enquiry although no time was stated but the said enquiry had commenced at 5.27pm. The applicants in the second OM were only told of the enquiry at 5.45pm after the enquiry had begun. In consequence, they were not present at the enquiry. The resultant effect was that the three applicants in the first OM had insufficient notice and the applicants in the second OM had no notice at all. Further, the charges had not been particularized. In fact, there was no specific charge as stated in the letter except for the heading as regards the hunger strike. There are also no notes of the relevant proceedings to assist this court as to what actually happened at the 'enquiry'. The only issue raised by the learned Federal Counsel for the respondent is that even if certiorari is granted, the damage had already been done as the punishment had been meted and carried out. She was therefore of the opinion that the court is not obliged to decide on an academic issue which is only of particular interest to the applicants. Federal Counsel also argued that the punishment prior to the enquiry was only for precautionary measures. I found no substance in her arguments as I saw no necessity for the respondent to totally ignore the legislative provisions in the process of taking precautions. There was also no clear evidence why the precautions were necessary in the first place. As for the academic issue, it was somewhat presumptuous for Federal Counsel to suggest that no one other than the applicants would be interested in the matter as the punishment had been carried out. There was also the question of who would be liable for costs in the circumstances. Having considered the sequence of events and the affidavits and arguments of both parties, the court is of the view for the reasons stated that the respondent had acted arbitrarily in the circumstances and had failed to observe the rules of natural justice in the process. To allow the punishment to stand would amount to blatant disregard of the provisions designed by legislative process to protect those very persons who have now been punished because these provisions had been ignored. In the consequence, the respondent's decision should be quashed despite the fact that the matter is now academic. In the event, the applications are allowed with costs.

Applications allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Yap Shao Sin*